

**UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA**

NATIONAL SECURITY ARCHIVE
The George Washington University
Gelman Library, Suite 701
2130 H Street, N.W.
Washington, D.C. 20037

Plaintiff,

v.

THE ARCHIVIST OF THE
UNITED STATES,
in his official capacity,
8601 Adelphi Road
College Park, Maryland 20740-6001

and

THE SECRETARY OF STATE OF
THE UNITED STATES,
in his official capacity,
2201 C Street, N.W.
Washington, D.C. 20520

Defendants.

Case No.:

Judge:

COMPLAINT

COMPLAINT FOR INJUNCTIVE RELIEF

NATURE OF THE ACTION

1. This is an action to compel the Archivist of the United States and the Secretary of State to seek the return of transcripts of Henry Kissinger's telephone conversations concerning official business while he was Secretary of State from 1973 to 1977 (the "telephone transcripts"). Near the end of his tenure as Secretary of State, Mr. Kissinger removed the telephone transcripts

from the State Department and purported to deed them (along with a host of other materials) to the Library of Congress with restrictions on public access.

2. Most, if not all, of the telephone transcripts are agency records as defined by federal law, and Mr. Kissinger had no authority to remove them under the governing federal statutes and regulations.

3. The Archivist of the United States and the Secretary of State have failed to initiate action through the Attorney General, as required by federal law, to recover the telephone transcripts.

4. Plaintiff National Security Archive files this action pursuant to the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701, 702 & 706, seeking injunctive relief, ordering the Secretary of State, with the assistance of the Archivist, to initiate action through the Attorney General to recover the telephone transcripts so that they may be accessible to the public.

JURISDICTION AND VENUE

5. This court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 701, 702 & 706.

6. Venue in this judicial district is proper under 28 U.S.C. § 1391(e).

PARTIES

7. Plaintiff National Security Archive is a non-profit public interest research institute and library based at George Washington University. The National Security Archive collects, catalogues, indexes, and publishes declassified and unclassified government

documentation on national security and foreign affairs policy, practices, and activities, and makes such records available to historians, researchers, and individuals throughout the country. Through its research and publication activities, the National Security Archive intends to use, and to make available to historians, journalists, and researchers, records on national security issues created by the Department of State and other federal agencies. The National Security Archive has a direct interest in ensuring that these records are maintained, preserved, and made accessible to the public in accordance with federal law. William Burr, a senior analyst at the National Security Archive, edited and annotated *The Kissinger Transcripts* (New Press 1999), which contains transcripts of then-Secretary of State Kissinger's meetings with Chinese and Soviet leaders.

8. Defendant Archivist of the United States ("Archivist") is responsible for the supervision and direction of the National Archives and Records Administration. 44 U.S.C. § 2102. The Archivist's duties include providing assistance to heads of agencies in initiating actions through the Attorney General to recover records that have been unlawfully removed from an agency. 44 U.S.C. §§ 2905(a) & 3106.

9. Defendant Secretary of State of the United States is responsible for administering the Department of State. The Secretary of State is required under the Federal Records Act to maintain and preserve State Department records and to take action to recover records that have been unlawfully removed from the Department. 44 U.S.C. § 3106.

STATUTORY FRAMEWORK

10. The Federal Records Act requires agencies to implement procedures for maintaining and preserving agency records and preventing their removal or loss. 44 U.S.C. §§ 3101, 3102 & 3105. The State Department's procedures for maintaining, preserving, and disposing of records are contained in the Foreign Affairs Handbook (*e.g.*, 5 FAH-4 H-200 et seq.) and the Foreign Affairs Manual (*e.g.*, 5 FAM §§ 430-435).

11. An agency record is defined as "all books, papers * * * or other documentary materials * * * made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency * * * as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them." 44 U.S.C. § 3301.

12. The Disposal of Records Act, 44 U.S.C. §§ 3301-3303a, 3308-3314, provides that agency records may not be disposed without the authorization of the Archivist.

13. The Federal Records Act provides a mechanism for recovering agency records that have been improperly removed from an agency. An agency head must notify the Archivist of such removal, and the agency head with the assistance of the Archivist must initiate action through the Attorney General for the recovery of improperly removed records. 44 U.S.C. § 3106. If the agency head fails to initiate the required action, then the Archivist is required to act independently through the Attorney General to recover the records. 44 U.S.C. § 3106; accord 44 U.S.C. § 2905. The legal duty imposed on the Archivist and agency heads by 44 U.S.C. §§ 2905

and 3106 may be enforced by private litigants. *Armstrong v. Bush*, 924 F.2d 282, 292 (D.C. Cir. 1991).

FACTUAL BACKGROUND

14. Between 1973 and 1977 Mr. Kissinger served as Secretary of State under Presidents Nixon and Ford. He also served as Assistant to the President for National Security Affairs between 1969 and 1975.

15. During Mr. Kissinger's government service, his secretaries generally monitored his telephone conversations and recorded their contents by shorthand or on tape. The secretaries transcribed the notes into summaries or verbatim transcripts of the conversations, which related to both official business and personal matters. The telephone conversations relating to official business included discussions with heads of state and foreign officials from around the world. The telephone transcripts, even those relating to official business, were kept in files that were labeled "personal."

16. On October 29, 1976, while still Secretary of State, Mr. Kissinger transferred the files containing the telephone transcripts and other materials from his office at the State Department to the New York estate of Nelson Rockefeller. Prior to removing such files, Mr. Kissinger did not receive approval from the State Department's Foreign Affairs Document and Reference Center, which had responsibility for the Department's record maintenance and disposal program. Nor did he or anyone else at the State Department seek approval from the National Archives, the General Services Administration or other appropriate officials responsible for the preservation of federal agency records.

17. Rather, Mr. Kissinger received a legal opinion from the Legal Adviser of the Department of State — who is not vested with authority over the maintenance and disposal of records — advising that the telephone transcripts were not agency records but were personal papers that Mr. Kissinger was free to take with him when he left office, because they had been kept in files marked “personal.”

18. After removing the files from the Department of State, Mr. Kissinger entered into two separate agreements with the Library of Congress for the transfer of the materials. The first agreement, dated November 12, 1976, related to a set of materials, which did not include the telephone transcripts. The agreement limited access to the materials to individuals approved by Mr. Kissinger, or approved by a committee of individuals named in Mr. Kissinger's will. Additionally, it included a prohibition on public access until 25 years after the transfer of the documents or five years after Mr. Kissinger's death, whichever is later.

19. By a second agreement, dated December 24, 1976, Mr. Kissinger purported to deed the telephone transcripts to the Library of Congress. The second agreement incorporated by reference all of the terms and conditions of the first agreement. In addition, the second agreement provided for public access to the telephone transcripts only with the consent of or upon the death of the other parties to the conversations.

20. Shortly after the telephone transcripts were transferred to the Library of Congress, the Archivist made two separate requests to inspect such transcripts to determine whether they were State Department records and whether Mr. Kissinger had the authority to remove them. Mr. Kissinger did not permit the Archivist to inspect the telephone transcripts.

21. At about the same time that the Archivist requested permission to review the telephone transcripts at the Library of Congress, a reporter and two organizations filed separate Freedom of Information Act ("FOIA") (5 U.S.C. § 552) requests seeking access to them. These requests were the subject of a lawsuit filed in 1977 in the District Court for the District of Columbia. The district court ruled that the transcripts were agency records because they were prepared on government time with the assistance of government employees and resources. *Reporters Committee for Freedom of the Press v. Vance*, 442 F. Supp. 383, 387 (D.D.C. 1977). The court held that the records were prepared in the course of Mr. Kissinger's official duties and should be returned to the State Department. *Ibid.* While the D.C. Circuit affirmed in relevant part, 589 F.2d 1116 (D.C. Cir. 1978), the Supreme Court reversed on jurisdictional grounds without addressing the merits. *Kissinger v. Reporters Committee For Freedom of the Press*, 445 U.S. 136 (1980).

22. After the *Kissinger* case was decided, the Department of State and Mr. Kissinger, negotiated an agreement, which established procedures for reviewing the telephone transcripts and determining which of them had to be returned to the State Department. The agreement was never implemented. Currently, Department of State historians are conducting a limited review of the telephone transcripts pursuant to conditions set by Mr. Kissinger. Such review is not being conducted by federal officials authorized by law to preserve and dispose of agency records, and Mr. Kissinger, who has no legal authority to restrict access to agency records by federal officials charged with preserving such records, continues to assert unbridled discretion to control access to and maintain the secrecy of the telephone transcripts.

COUNT I

(Failure to Initiate Action for Recovery of Agency Records, 44 U.S.C. §§ 2905(a), 3106)

23. Plaintiffs incorporate the allegations contained in Paragraphs 1-22 as if fully set forth herein.

24. By removing the telephone transcripts, which have been found by a federal court to be "agency records" (see *Reporters Committee*, 442 F. Supp. at 387), without observing State Department procedures for the removal of records, or obtaining the approval of the Archivist or other appropriate officials for such removal, as required by the Disposal of Records Act (e.g., 44 U.S.C. §§ 3303, 3303a), Mr. Kissinger unlawfully removed State Department records.

25. Under the Federal Records Act, the Secretary of State must notify the Archivist of the unlawful removal of agency records, and with the assistance of the Archivist, initiate action through the Attorney General to recover such records. 44 U.S.C. § 3106. The Secretary of State has failed to take the legally mandated steps to recover the telephone transcripts.

26. The Federal Records Act also requires that if the agency head fails to initiate action within a reasonable period of time, the Archivist must act independently to initiate action through the Attorney General to recover the agency records. 44 U.S.C. §§ 2905(a) & 3106. Despite the failure of the Secretary of State to initiate the required action to recover the telephone transcripts, the Archivist has not acted independently to initiate action through the Attorney General.

27. By failing to take action to recover the telephone transcripts from the Library of Congress, the Secretary of State and the Archivist are violating their statutorily mandated obligations, resulting in an injury to Plaintiff. Unlike documents classified as "agency records"

that can be obtained by the public through FOIA requests or otherwise, the telephone transcripts are unavailable to the public — which includes foreign policy researchers such as Plaintiff — pursuant to the purported (but legally invalid) deeds through which Mr. Kissinger conveyed these agency records to the Library of Congress. Once the telephone transcripts are returned to the National Archives or the State Department, as required by federal law, Plaintiff will be able to obtain access to the non-exempt information contained in the telephone transcripts.

28. Plaintiff is therefore entitled to injunctive relief, ordering the Secretary of State, with the assistance of the Archivist, to comply with the statutory duties imposed by 44 U.S.C. §§ 2905(a) & 3106, and initiate action through the Attorney General to recover the telephone transcripts.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court:

A. Enter an order requiring the Secretary of State, with the assistance of the Archivist, to initiate action through the Attorney General to recover the telephone transcripts.

B. Enter an order requiring an expedited review by the State Department and the Archivist once the telephone transcripts are returned to those agencies to avoid further delay in obtaining public access to the telephone transcripts.

- C. Award National Security Archive its costs, expenses, and reasonable attorneys' fees;
- D. Grant such other and additional relief as the Court may deem just and proper.

Dated: February 13, 2001

Respectfully Submitted,

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